

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
CIVIL ACTION NO. 02-182 ERIE

v.

CRIMINAL NO. 98-5 ERIE
MARCRESSE McCOY

EVIDENTIARY HEARING

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Friday, September 16, 2005.

APPEARANCES:

MARSHALL J. PICCININI, Assistant United States
Attorney, appearing on behalf of the Government.

BRUCE A. ANTKOWIAK, Esquire, appearing on behalf
of the Defendant, Marcresse McCoy.

Ronald J. Bench, RMR - Official Court Reporter

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1 P R O C E E D I N G S

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3 (Whereupon, the proceedings began at 10:00 a.m., on

4 Friday, September 16, 2005, in Courtroom C.)

5

6 THE COURT: This is the time that we have set for an

7 evidentiary hearing. The focus of this hearing, pursuant to

8 the instructions from the circuit, will be to determine whether

9 there exists a reasonable probability that the government would

10 have been unable to meet its burden on the elements of

11 knowledge and intent without a Jemal stipulation. And,

12 secondly, I would be considering whether Ms. Diggs' decision to

13 enter into a Jemal stipulation fell below an objective standard

14 of reasonableness. Those are the issues as I understand it.

15 Are you ready to go?

16 MR. ANTKOWIAK: Yes, your Honor.

17 THE COURT: All right.

18 MR. ANTKOWIAK: Your Honor, we'll call Ms. Diggs.

19 THE CLERK: Please state your full name for the

20 record?

21 THE WITNESS: Khadija T. Diggs.

22 MR. ANTKOWIAK: Before we begin questioning, I have

23 prepared and given Mr. Piccinini copies, these are copies of

24 things that are already in this record. There is nothing new

25 in here except for the Jencks material documents that I will be

1 offering. I just assumed that we write on a slate that is
2 filled with this record so far.

3 THE COURT: There's not much room left to write.

4 MR. ANTKOWIAK: I was going to add we need a bigger
5 board. For the convenience of the court, any of these
6 documents that are referred to, I have a set.

7 THE COURT: That will be fine, that will be helpful.

8 MR. ANTKOWIAK: Thank you.

9 KHADIJA T. DIGGS, PETITIONER'S WITNESS, SWORN

10 DIRECT EXAMINATION

11 BY MR. ANTKOWIAK:

12 Q. For the record would you please state your name?

13 A. Khadija T. Diggs.

14 Q. And, Ms. Diggs, during the months of October and November
15 of 1998 specifically, were you serving as an assistant Federal
16 Public Defender here in Erie, Pennsylvania?

17 A. Yes.

18 Q. And were you in fact at that time trial counsel for the
19 defendant, Marcresse McCoy, in a trial of the matter that you
20 are now before the court?

21 A. Yes.

22 Q. Now, Ms. Diggs, as the court has already indicated, we're

23 here regarding some specific matters that particularly pertain

24 to what would be reflected in the record as a portion of the

25 jury charge that his Honor gave that appears on November 3rd

5

1 transcript, beginning at page 122. Simply for the record, the

2 portion that has been the subject of this post-appeal

3 litigation concerns the court's description of the elements of

4 possession within intent to distribute and the court's

5 instruction as follows from the record: "However, in this

6 case, the defendants have stipulated to certain elements of

7 each of the offenses. That is with regard to the crimes of

8 possession with intent to distribute marijuana and possession

9 with intent to distribute cocaine. If you should find from all

10 of the evidence that the government has proven beyond a

11 reasonable doubt that Joseph Barnette and/or Marcresse McCoy

12 were in possession of the blue duffel bag seized by law

13 enforcement officers at any time, then you may conclude without

14 further evidence that Joseph Barnette and Marcresse McCoy knew

15 that the blue duffel bag contained cocaine and marijuana and

16 that they or he intended to distribute them. However, you may
17 conclude this only in the event that you find that the
18 government has proved beyond a reasonable doubt that Joseph
19 Barnette and/or Marcresse McCoy were in possession of the blue
20 duffel bag. The defense of each defendant in this case is that
21 they were not in possession of the blue duffel bag." Do you
22 understand that to be the subject matter here?
23 A. Yes.
24 Q. And am I correct that that jury instruction was given
25 without any objection by you?

6

1 A. That's correct.
2 Q. And indeed with your consent?
3 A. Yes.
4 Q. And am I also correct that that jury instruction
5 memorialized for the record the stipulation that you had
6 entered into on behalf of Mr. McCoy?
7 A. You're correct.
8 Q. Now, before I ask you to describe the circumstances that
9 led to the decision to stipulate, my first question is was the

10 decision to stipulate, the decision to agree on the jury

11 instruction, was that a decision you made only with the

12 specific consent of your client, Mr. McCoy?

13 A. No.

14 Q. Did he ask you to do that?

15 A. No.

16 Q. Could you describe for the court what if any discussions

17 you had with him about that, and whether that was either before

18 or after the decision to go ahead and do it?

19 A. There was a very limited exchange immediately preceding

20 trial, in fact, we may have already been in the midst of jury

21 selection, that would have been the first time I would have had

22 any conversation with Mr. McCoy about a Jemal stipulation. And

23 the conversation was very short, and I did not have a sense

24 that he really understood what I was describing to him and he

25 did not agree to it or even disagree, I think he just didn't

1 grasp it.

2 Q. But as his counsel you did agree to it and did stipulate?

3 A. Yes.

4 THE COURT: Run that by me again I didn't hear the
5 question and answer, I'm sorry.

6 BY MR. ANTKOWIAK:

7 Q. But as his counsel you did agree to it and you did
8 stipulate?

9 A. And my answer was yes.

10 THE COURT: Thank you.

11 BY MR. ANTKOWIAK:

12 Q. Now, you made reference to the fact of what has been
13 called a Jemal stipulation throughout the course of this

14 proceeding. Prior to the trial of this case, had you ever
15 heard of a Jemal stipulation?

16 A. No.

17 Q. And did you know what it was?

18 A. No.

19 Q. As it became a factor in this case, what did you
20 understand its purpose to be, particularly in the context of
21 this case?

22 A. With regard to this case, the purpose of a Jemal

23 stipulation would be to keep from the jury's attention and to

24 keep the government from putting on evidence that would show a
25 prior history and relationship between Barnette and McCoy in

8

1 Erie distributing drugs. So it would take out the elements of
2 knowledge and intent, and it would reduce the trial basically
3 to a trial on possession of the duffel bag.

4 Q. So that you would be precluded from arguing knowledge and
5 intent to the jury?

6 A. Correct.

7 Q. Now, am I correct that the whole issue of a Jemal

8 stipulation arose after the government filed certain notices of
9 its intent to use certain evidence under Rule 404(b)?

10 A. Yes, you're correct.

11 MR. ANTKOWIAK: Does your Honor prefer I ask leave
12 to approach the witness?

13 THE COURT: You don't have to ask to approach the
14 witness, you can go up whenever you want.

15 MR. ANTKOWIAK: Thank you.

16 BY MR. ANTKOWIAK:

17 Q. Ms. Diggs, I'm handing you and I've supplied to the
18 court, and it's part of the record as the government's notices
19 of intent to use 404(b) evidence. I believe there were two of
20 them. I think the top one was filed on the 14th of October,
21 and then there was a status conference, and then there was
22 another one filed on the 16th of October. Are those the ones
23 you remember getting?

24 A. Yes.

25 Q. Now, when you got those, how did you respond to that,

9

1 what legal position did you initially take with respect to
2 those notices?

3 A. I responded, the legal position was ultimately that I
4 agreed to a Jemal stipulation to preclude the 404(b) evidence

5 from coming in, would be the legal position.

6 Q. Initially, what position did you take, did you stipulate
7 right away when you got these?

8 A. No, the stipulation developed primarily as a result of
9 counsel for Joseph Barnette initiated the stipulation concept.

10 I believe he may have even brought a draft to court for a

11 pretrial hearing. And I was asked if Mr. McCoy would join in a
12 similar stipulation. Basically, my response at that point was
13 I would consider it. I would discuss it with my client, but I
14 did not see that it was really something that pertained to him
15 in a way that pertained to the co-defendant, Barnette.

16 Q. When you got these notices, did you have any concerns
17 about the specifics of the 404(b)?

18 A. The representation that had been made by the U.S.
19 Attorney's Office did not match up with the specifics that were
20 ultimately provided. So I felt like I was being asked to make
21 a stipulation without knowing the details of what the 404(b) or
22 prior bad acts evidence was. And I felt like I needed
23 specifics so that I would be able to investigate those things.
24 I needed to know when and where and who.

25 Q. Prior to the time you would have received any Jencks

1 material in the case, did the United States provide you with
2 any specifics in terms of the names of witnesses, details of
3 their allegations about these supposed 404(b) materials?

4 A. No, prior to the Jencks material, we were moving forward

5 based on the verbal representations of the assistant United

6 States Attorney.

7 Q. And were those representations made on the record or were

8 there additional recommendations made off the record?

9 A. I think probably both. But they were consistent

10 representations. Whatever he said on the record was the same

11 as the things that were said off the record.

12 Q. Now, you mentioned that you also had discussions with

13 counsel for the co-defendant in this case?

14 A. Yes.

15 THE COURT: If I could interrupt for one second.

16 When you say there were representations by the U.S. Attorney

17 both on and off the record, by the term representations, I

18 assume you mean descriptions as to the nature of the 404(b)

19 evidence that they intended to present, is that right?

20 THE WITNESS: Yes, your Honor.

21 THE COURT: Okay, go ahead.

22 BY MR. ANTKOWIAK:

23 Q. So we can be clear, to follow up the court's question,

24 you said whatever may have been said off the record, was no

25 more specific than what was said on the record?

11

1 A. Correct.

2 Q. Okay. Now, you had conversations with Mr. Sambroak who
3 represented Joseph Barnette?

4 A. Yes.

5 Q. Now, did Mr. Sambroak tell you that the government had
6 given him any more specifics about what the 404(b) was?

7 A. No.

8 Q. Now, who was it that first talked about this Jemal

9 stipulation?

10 A. Mr. Sambroak.

11 Q. And did he approach you about joining into it?

12 A. Yes.

13 Q. Tell the court about the discussions you had with him
14 concerning that matter?

15 A. My best guess would be the evening before the pretrial
16 hearing, we definitely talked about it on the phone, I think he
17 may have even faxed me a draft version that he was going to
18 present, and suggested that I consider a similar approach with

19 regard to representing Mr. McCoy.

20 Q. Now, at that time did you agree with him?

21 A. No, I wasn't familiar with the concept. So I started to

22 research it. And I did not agree at that time or even the

23 following day, if it was the following day that we had a

24 pretrial conference or a pretrial hearing.

25 Q. I believe the record will reflect that on behalf of Mr.

12

1 Barnette, Mr. Sambroak filed a stipulation on the 19th of

2 October, there was a copy of that signed by him and his client;

3 you didn't sign that?

4 A. No.

5 Q. And, in fact, you never signed any particular written

6 stipulation about this, did you?

7 A. No.

8 Q. Did you perceive at the time Mr. Sambroak first talked to

9 you about entering into this stipulation, did you perceive a

10 difference in the situations facing your client and the

11 situation facing Mr. Barnette?

12 A. Yes.

13 Q. What was that difference?

14 A. The prior history for the two defendants was different.

15 My client's prior history was for a firearm. Mr. Barnette's

16 prior history included drugs. So I didn't have the same

17 concern about the prior history of drug trafficking that Mr.

18 Barnette would have had.

19 Q. Okay. And did Mr. Sambroak urge you to do this

20 stipulation with him?

21 A. Yes.

22 Q. What did he express to you were his reasons for that?

23 A. He was concerned that the defenses not be in conflict

24 with each other. He was concerned that the prior history that

25 the government represented existed between the two clients and

13

1 in Erie not be put forward in front of the jury. He was

2 concerned that would taint their perspective of the two

3 defendants and give them reason to believe that if they had

4 similar conduct in the past, they should believe that was the

5 same conduct at the time of trial for the charges that were

6 being tried.

7 Q. When he initially said that to you, what was your
8 reaction?

9 A. I told him I'd look at it and consider it.

10 Q. On the record when there were, I believe, at least two
11 hearings before Judge McLaughlin that concerned the 404(b), did
12 you initially take the position to oppose its admission?

13 A. I wouldn't describe my position as opposing it. I think
14 my position pretty consistently was asking for the specific
15 information that would support it. I needed the details so
16 that I could make an informed decision about whether it was or
17 was not sufficiently harmful to Mr. McCoy, so that I could
18 decide whether or not it would make sense to enter a Jemal

19 stipulation. I don't know that I ever just flat out said no,
20 we're not going to do it or yes, we are going to do it.

21 Q. That was with respect to stipulating?

22 A. Yes.

23 Q. But insofar as the government was offering Rule 404(b)
24 evidence, did you object to that?

25 A. Yes, I thought it was inappropriate.

1 Q. And do you recall that ultimately, particularly, the end
2 of the October 23rd hearing, Judge McLaughlin ruled with
3 respect to 404(b) evidence in this case?

4 A. I now know that he did because I reviewed the transcript.
5 But never during the course of the hearing or at trial did I
6 realize that Judge McLaughlin had ruled.

7 Q. Okay. You know now that at the end of the October 23rd
8 hearing he had ruled that prior drug activity would be
9 excluded, prior associations between the two men would be
10 permitted and the government had made an offer of what they
11 called signature evidence and the court also excluded that?

12 A. Yes.

13 Q. Now, was it your understanding as of the close of that
14 hearing on October 23rd, that you had actually agreed to this
15 Jemal stipulation?

16 A. No.

17 Q. As you think back about this, at what point in this
18 proceeding did you agree?

19 A. I don't think I ever agreed to it overtly. I do believe
20 I agreed to it tacitly. I did not object to the charge to the

21 jury, it was based on that stipulation. And I tried the whole

22 case and I believe the government tried its whole case as

23 though I had agreed.

24 Q. Why didn't you just come out and agree?

25 A. I was never satisfied that it was the right decision.

15

1 Q. Now, you mentioned at the time you got the Jencks

2 material, there were specifics provided about what the

3 government witnesses would say about prior evidence, correct?

4 A. Yes.

5 Q. And would I be correct that the Jencks material would be

6 delivered to you sometime right before jury selection began?

7 A. I can't say that it was right before jury selection. I

8 can say -- you know, generally the eve of trial kind of

9 situation. I can say very close in time to doing the case.

10 Q. As is the usual practice?

11 A. Yes.

12 Q. Had you reviewed that Jencks material?

13 A. Yes.

14 Q. What conclusions, if any, did you draw having reviewed
15 that Jencks material?

16 A. I thought that perhaps I had not been provided with all
17 of the Jencks material because what I reviewed did not match up

18 with what had been verbally represented by the government as to
19 the nature of the 404(b) evidence against McCoy. So I was
20 pretty sure that I didn't have everything.

21 Q. In fact, if I can show you the October 27th transcript,
22 this would have been the day of jury selection or on the eve of
23 and after Mr. Sambroak had indicated that the Jencks material

24 had been delivered to him the night before. Just referring you
25 to page 73, would you indicate for this record what you asked

16

1 in open court at that time?

2 A. It says "can we finish up with the evidence" --

3 THE COURT: Could you speak just a little bit more
4 into the mike.

5 THE WITNESS: "Can we finish up with the evidence.

6 I still am not clear on what the evidence is that relates to

7 the relationship and how separating that out from the drug

8 trafficking. All of the additional information that comes

9 forward. As far as I can tell, it seems to relate directly to

10 Barnette. This is something we have not been provided yet that

11 talks about a relationship."

12 Q. And was what the answer?

13 A. The answer is from Mr. Trucilla, it says "there's only a

14 few witnesses that can say McCoy and Barnette were in fact

15 previous associates. It's rather limited." Do you want me to

16 keep going?

17 Q. No. You referred to Jencks material. Have you had an

18 opportunity to review what was provided to you as Jencks

19 material by the United States in this case?

20 A. Yes.

21 MR. ANTKOWIAK: Your Honor, I've discussed this with

22 Mr. Piccinini before the hearing. I would ask for purposes of

23 this record that the Jencks material be admitted under seal.

24 There are documents that I'm sure that have not been made

25 public and might refer to other government witnesses, even

1 though it's a little old for purposes of this record and, your
2 Honor, I have provided a copy of it, I would ask that the
3 Jencks material be admitted as an exhibit under seal.

4 THE COURT: Is that the government's request as
5 well?

6 MR. PICCININI: My concern there is that a few of
7 those documents specifically relate to this issue. The rest of
8 documents do not. I don't know all of them should be admitted
9 under seal. As long as they're disclosed publicly, I guess I
10 have no objection.

11 THE COURT: Sealing doesn't affect this.

12 MR. ANTKOWIAK: Opening that up to specifically
13 what's part of it. I'm concerned the complete record of what
14 counsel had received at the time --

15 THE COURT: I think that's reasonable under the
16 circumstances.

17 BY MR. ANTKOWIAK:

18 Q. You said you were concerned you didn't think you got
19 everything?

20 A. Right.

21 Q. How much of the information in there related to McCoy?

22 A. Little to none.

23 Q. Based on your review of that, did you have any concerns
24 of the Jemal stipulation?

25 A. Based on my review of the Jencks material, I felt that

18

1 the Jemal stipulation was not in the best interests of McCoy.

2 Q. Now, Ms. Diggs, prior to today and as part of this 2255,
3 the court had directed you to go back through your notes of
4 trial and to disclose to Mr. Piccinini and myself any of your
5 notes you took contemporaneously that in any way relates to the
6 Jemal stipulation; and you did that, correct?

7 A. Yes.

8 Q. I'd like to show you what is a folder of trial counsel
9 notes, which already has been made part of this record.

10 THE COURT: You know what I'm thinking, it's not too
11 late to start right now, but for ease of record review at the

12 circuit, we probably should be identifying these matters as we
13 go because they'll hunt for that through the record and it's
14 going to be very difficult. Why don't we start now.

15 MR. ANTKOWIAK: I think if we could designate the
16 government's notices under 404(b) as Defense Exhibit A or
17 Petitioner's Exhibit A. The Jencks material as Petitioner's

18 Exhibit B under seal. And then this document -- this last
19 document I showed you, the notes of trial counsel, would be
20 Petitioner's Exhibit C.

21 THE COURT: All right.

22 BY MR. ANTKOWIAK:

23 Q. Now, Ms. Diggs, particularly referring you to the page of
24 those notes that you have identified, you took on or about
25 October 28th, do you have those?

19

1 A. Yes.

2 Q. Could you read those notes, please?

3 A. There's a "tc P. Hackney", that would be telephone call
4 with Penn Hackney, who was one of the assistant Federal

5 Defenders in my office as well. He worked in the Pittsburgh

6 office. Do you want me read them or explain them, they're

7 chicken scratch kind of notes.

8 Q. Both.

9 A. Okay. And then there's in the corner a note that says

10 "McCoy." There's a "Rule 14 improper joinder." And then

11 "404(b) not to be used as evidence." And then says

12 "prosecutorial misconduct causing tactical decision.

13 Re-evaluate the Jemal stipulation. What are the consequences.

14 Might have to sever. Exclude or stipulate." And then there's

15 a note that says "hiding the stub."

16 Q. What did all that mean?

17 A. It meant that -- I was concerned that I had agreed to the

18 Jemal stipulation based on an inaccurate representation by the

19 government of what Mr. McCoy's prior bad acts were. And that I

20 was trying to figure out how to undo the damage.

21 Q. Did you believe at that point that the Jemal stipulation

22 was an error?

23 A. (No response.)

24 Q. Do you need a moment?

25 THE COURT: We'll take a short break.

20

1 (Recess from 10:26 a.m.; until 10:28 a.m.)

2 THE COURT: Mr. Antkowiak.

3 BY MR. ANTKOWIAK:

4 Q. Did you believe at that time that the Jemal stipulation

5 was an error?

6 A. Yes, it was an error.

7 THE COURT: Why?

8 THE WITNESS: Once I actually had the specific

9 evidence that the government would present, if it was allowed

10 to use prior bad acts against McCoy, I felt like it was so far

11 below the nature of evidence that I should be seeking to

12 preclude by the Jemal stipulation. I felt like that it was so

13 minimal that there was no advantage in agreeing to defend the

14 case on possession alone. I felt like the case, I felt

15 basically like I was bamboozled into an agreement that damaged

16 my client, I didn't know how to get out of it.

17 BY MR. ANTKOWIAK:

18 Q. So you continued to persist in the stipulation and did

19 not object to the jury instruction?

20 A. Yes.

21 Q. And I take it from your testimony that there would be no

22 other strategic or tactical purpose to persist in that

23 stipulation that you had?

24 A. No, the only reason -- that I entered into the Jemal

25 stipulation was to keep the jury from hearing some long saga of

21

1 the history of McCoy and Barnette in Erie trafficking drugs.

2 I didn't want that to come out. And then there was no evidence

3 of that. Other than that Jemal stipulation, it was of no

4 benefit.

5 Q. You tried this case by calling a number of witnesses to

6 try to impeach the credibility of two police officers who

7 claimed to have seen Mr. McCoy with that bag, correct?

8 A. Yes.

9 Q. And am I correct that besides those two police officers

10 who claimed he had the bag, there was also Mr. Grier, who came

11 in and testified that he took the bag off the bus in Erie?

12 A. Yes. He meaning McCoy?

13 Q. He meaning McCoy, yes, I'm sorry?

14 A. Yes.

15 Q. And there were no witnesses that you were able to offer

16 to say that someone else had taken that bag off the bus in

17 Erie?

18 A. Correct.

19 Q. You had mentioned before that Mr. Sambroak had indicated

20 that one of the advantages of this joint stipulation would be

21 inconsistent defenses. If you had not stipulated to that Jemal

22 stipulation, would you still have been able to call all those

23 witnesses to try to impeach the credibility of McCoy taking the

24 bag off the bus?

25 A. Yes.

22

1 MR. ANTKOWIAK: Thank you, that's all I have.

2 MR. PICCININI: Did you mark this as an exhibit?

3 MR. ANTKOWIAK: It's C, I believe, Petitioner's

4 Exhibit C.

5 THE COURT: It is Exhibit C.

6 CROSS-EXAMINATION

7 BY MR. PICCININI:

8 Q. Ms. Diggs, I'm going to show you what Mr. Antkowiak has
9 provided to you as Exhibit C, and it appears to be two pages of
10 notes?

11 A. Yes.

12 Q. Attached to a cover letter. Could you indicate to me on
13 the page which refers to prosecutorial misconduct causing
14 tactical decisions and reevaluate Jemal stipulation; how do you
15 know the date of that particular discussion?

16 A. The cover letter to the notes explains that -- that page
17 was, the specific paragraph covered, "please be advised that
18 the undated document," which is the document you're referring
19 to, "is the top page of a group of five pages which were
20 stapled together, with an underlying page dated October 28th.
21 It is only the top page which appears to be relevant to the
22 Jemal stipulation and has been copied for review." I was asked

23 by the court to find the documents specific to the Jemal
24 stipulation and that's the only reason I didn't provide all

25 five of the pages that were stapled together.

23

1 Q. So you have a note somewhere which would indicate that
2 this telephone conversation with Penn Hackney occurred on the
3 28th of October?

4 A. That would be my best guess since they were stapled
5 together.

6 Q. But what on those pages indicates that this phone
7 conversation occurred on the 28th; because here at the top of
8 your notes, with regard to this conversation, on this undated
9 page, it says "tc" --

10 A. Yes.

11 Q. "P. Hackney", and there's the notes themselves. What on
12 this page indicates the date under which you had a conversation
13 with Penn Hackney?

14 A. Nothing on that page indicates the date.

15 Q. Okay. So what is it that causes you to believe that this
16 particular phone conversation happened on the 28th, as opposed
17 to, for example, the 16th, where your notes concerning Mr.
18 McCoy exist?

19 A. I wouldn't try to convince anybody that the conversation
20 happened on that particular date. I simply wanted everyone who
21 had to look at the notes to know where they were within the
22 body of the file. And they were stapled to other pages that
23 had the date. I don't think anybody could look at that page in
24 isolation and say it happened on a particular date.

25 Q. So, then, that's my question of you. Do you know today

24

1 that this phone conversation that you had with Penn Hackney
2 occurred on October 28th?

3 A. No, I couldn't even tell you the date of the trial in
4 this case.

5 Q. Well, maybe I could help you with that. The first day of
6 trial where testimony was taken, with the first witness being
7 Mr. Siegworth, occurred on October 28, 1998?

8 A. Okay.

9 Q. Were you up here in Erie at the time throughout the trial
10 itself?

11 A. Yes, I lived here.

12 Q. And the trial, the first day of witnesses occurred on the

13 28th. Would you have had a conversation with Penn Hackney on
14 the 28th consistent with these notes? Let me show you the
15 notes and show you why I'm asking this question. Because the
16 first line on the notes to Penn Hackney talks about Rule 14
17 improper joinder. And joinder is a pretrial concern about
18 whether the cases of McCoy and Barnette should have been
19 joined. Now that the trial had already started and testimony
20 had already been given, that evening after the trial would you
21 have had a conversation with Penn Hackney concerning Rule 14
22 improper joinder?

23 A. Yes, potentially, and I think it would have been in terms
24 of looking at how to undo the damage and what impact it would
25 have on the process in the court. Because if I was not still

25

1 going to have these defenses that were consistent, it would
2 have affected the entire process. If I now had a co-defendant
3 who was prepared to put on a case that damaged the
4 co-defendant, that would affect what the court had to do as
5 well. So I could have had that conversation with Penn Hackney
6 at that time, as opposed to pretrial. And the reason that I

7 think it would have occurred then, is that would have been

8 immediately after I got the Jencks material and knew that the

9 verbal representations of 404(b) evidence were different from

10 the real evidence.

11 Q. Okay. Well, the date that you received the Jencks

12 material would have been on October 27, 1998. And would you

13 have waited until after having been concerned about a failure

14 to disclose the proper 404(b) evidence, supporting the 404(b),

15 excuse me, would have been concerned to wait after the evening

16 of the 27th, when the information was provided, I believe the

17 Jencks material came to you on Monday the 26th because it

18 didn't come to you Friday because of some concerns, as the

19 record reflected. But you weren't given the Jencks material on

20 the 28th, it would have been closer to the time of the 27th

21 when you were asking Mr. Trucilla or the court whether there

22 was more information. Would you agree with that; you got the

23 Jencks material on the day that you were asking the court

24 whether there was anything else from the government?

25 A. I can't confirm for you the dates or the sequence. I can

1 tell you that we had at least two or three hearings where we
2 were having that same conversation about I need the specifics.
3 And then once I got the specifics, I was concerned that that
4 can't be all of it because this doesn't match. And then once I
5 had, I guess as close as I would ever get to confirmation, yes,
6 this is all of it, then I was trying to figure out how do I
7 undo this damage. That's what I think would be the substance
8 of my conversation with Penn Hackney.

9 Q. Okay.

10 A. I don't know if that answers your question.

11 Q. First of all, let's go back. Do you know when this
12 conversation that you had notes for occurred with Mr. Hackney?

13 A. I don't know, I can only surmise that it was the 28th
14 because that's the date of the documents it was stapled to, but
15 no, I don't know.

16 Q. But you'd agree with me that this is the beginning of a
17 conversation with Penn Hackney, this isn't the end of a
18 conversation with Penn Hackney because it says, "tc P. Hackney"
19 without a date. When you make your phone notes, do you wait

20 four pages in the notes on a particular date to write who the
21 phone conversation is with, obviously, you don't do that, do
22 you -- when you make phone notes concerning your conversation
23 with anybody, wouldn't you put the person's name at the
24 beginning of those notes?
25 A. If you maybe had the opportunity to look at the notes

27

1 file in its entirety, you would you see it's not that kind of a
2 chronological document. My notes historically are literally
3 just my notes. Which, as you see, it's not an orderly thing.
4 It's sort of chicken scratch stream of consciousness thing. So
5 I don't know how to tell you where it should be or what you
6 should surmise from the order that it's in. I don't know how
7 to answer that.

8 Q. So you don't know the date of it?

9 A. No.

10 Q. Down further in the notes it says "might have to sever."

11 Have you ever in your many years experience as a defense
12 attorney waited until after the trial has begun to file a
13 motion to sever?

14 A. I don't think so.

15 Q. And then later it says, it says the words "exclude or
16 stipulate." Does that reflect for you your consideration of
17 whether to take steps to exclude the evidence or to stipulate
18 to the Jemal stipulation?

19 A. That's a reasonable interpretation. I can't tell you
20 that that's what I meant at the time, but what you said is
21 reasonable.

22 Q. But you don't know whether these phone notes refer to a
23 pretrial conversation you had with Mr. Hackney or a trial that
24 occurred after the Jencks material was provided?

25 A. Well, I do know the answer to that.

28

1 Q. What is the answer?

2 A. Prosecutorial misconduct notes relate specifically to the
3 Jemal stipulation, which was not a pretrial matter, we were

4 already in trial.

5 Q. The questioning or the whole discussion concerning the

6 Jemal stipulation occurred at the earlier motion, pretrial

7 motion, and you had two days of it where you discussed the

8 Jemal stipulation?

9 A. Only two days.

10 Q. Well, there were two days in the beginning, there were

11 particular hearings related to the 404(b) evidence when the

12 Jemal stipulation occurred?

13 A. Okay.

14 Q. Why do you believe that this prosecutorial misconduct

15 causing tactical decisions only occurred after the provision of

16 the Jencks material?

17 A. Because I had no thought that there was anything that

18 would be described as prosecutorial misconduct before I had the

19 Jencks material. Before I had the Jencks, I was going with the

20 verbal representations. Once I got the Jencks, it was like

21 something is wrong.

22 THE COURT: Let me jump in here for just a second.

23 Tell me if I have this right. Upon your receipt of the Jencks

24 material and your review of the Jencks material, you came to

25 the conclusion that the Jencks material did not support the

29

1 government's representations as to the nature of the 404(b)

2 evidence that they could prove up, is that right?

3 THE WITNESS: Yes.

4 THE COURT: And would you have received the 404(b)

5 material prior to, and you did in fact receive that prior to

6 the commencement of trial, is that correct?

7 THE WITNESS: We might have been picking the jury or

8 it might be immediately preceding that, I don't know.

9 MR. ANTKOWIAK: May I, I'm sorry. If I could see

10 the transcript of the 27th --

11 MR. PICCININI: If I could continue with my

12 questioning.

13 THE COURT: What are we doing here, we've got a

14 different team on the floor.

15 MR. ANTKOWIAK: I didn't mean to interrupt.

16 MR. PICCININI: Typically, we do one counsel and

17 then the other.

18 THE COURT: Usually one counsel is more than
19 adequate.

20 MR. PICCININI: If you would allow me to proceed,
21 your Honor, I have the letter, the Jencks letter that was sent

22 to Ms. Diggs.

23 THE COURT: All right, that would be fine. Then I
24 do have one last question. But go ahead. If there's something
25 in the record that reflects when she received it, perhaps you

30

1 could direct her attention to that, Mr. Piccinini.

2 BY MR. PICCININI:

3 Q. Ma'am, I'm going to show you the Jencks notice itself,

4 which is a letter dated October 26, 1998, addressed to you,
5 which provides to you some 41 different sets of documents. And
6 would you agree with me that on that page dated 10/26/1998, you
7 signed the document?

8 A. I did sign the document, and I can't tell what the date
9 is, I don't have any reason to disagree with the 26th, though.

10 Q. It says here "I hereby acknowledge receipt of the
11 above-mentioned Jencks/Brady material and agree to abide by the
12 restrictions set forth above."

13 A. Okay.

14 Q. In your experience, isn't it true on the date the letter
15 is provided to you, you sign it as a receipt and you take the
16 Jencks material?

17 A. Yes.

18 Q. Just as you did in this case, after trial, you send the
19 letter to Mr. Trucilla and send it back. Here you did so on
20 November 13, 1998?

21 A. Okay, yes.

22 Q. So you can accept that?

23 A. Yes.

24 Q. So October 26, 1998, is when you get the Jencks material?

25 A. Yes.

1 Q. Now, you indicated that until you received the Jencks

2 material, you were comfortable with accepting Mr. Trucilla's

3 representations concerning what 404(b) evidence is?

4 A. Yes.

5 Q. If I can show you the transcript on Friday, October 23rd,

6 this is the hearing on pretrial motions -- I'm going to refer

7 you to page 32 of this document, this is all a discussion about

8 Jencks and the 404(b) material?

9 A. Okay.

10 MR. ANTKOWIAK: Excuse me, what page?

11 MR. PICCININI: This is page 32, counsel.

12 THE COURT: What is the date of the hearing?

13 MR. PICCININI: This is the second day of the

14 pretrial hearings, this is October 23, 1998.

15 THE COURT: All right.

16 BY MR. PICCININI:

17 Q. If I can show you on here, there's some discussion

18 between you and Mr. Trucilla, and the court says "Mr. Trucilla,

19 what about that?" And Mr. Trucilla explains "let me make a

20 note, your Honor." And you, Ms. Diggs say, "your Honor,

21 actually your orders might help resolve some of this since it

22 is Friday we're due the rest of the discovery items, that may

23 answer a lot of questions that we're standing here arguing

24 about." So you wanted the Jencks material because you knew by

25 the end of the day on this Friday, October 23rd, you typically

32

1 would be getting the Jencks material by that time, is that

2 correct -- was it your practice here in Erie on the Friday

3 before a Monday jury selection that's when you would receive

4 Jencks material?

5 A. We didn't have enough of a history at that point to have

6 a practice. And I do remember that we had a lot of back and

7 forth about when we would get what we would get. So I can't

8 tell you.

9 Q. Okay. So then it goes on further, it says, Mr. Trucilla

10 says, "I'll do it right here, I'm prepared to tell them

11 everything but the name. And they're going to get the names

12 later today in Jencks material." And Ms. Diggs, you say

13 "that's what I meant." And Mr. Trucilla goes on, "basically,

14 I'm telling you everything except the names. Through the

15 summer of '97, into the fall of '97, into the winter of '97 and
16 then into early winter of '98, there were, as I believe the
17 testimony will show, that McCoy, who was known as Two-four to
18 the particular individual, sold crack cocaine for Barnette.
19 Now, I'm not saying, your Honor," then he goes all the way
20 through on page 33 with a description about affiliation between
21 Mr. McCoy and Barnette. Drug dealing between the two of them
22 and these particular baggies that were there. You indicated
23 you accepted Mr. Trucilla's representation as to the 404(b).
24 But I'd ask you to look at page 34. You then, you don't just
25 accept it, you actually challenge Mr. Trucilla on what the

33

1 404(b) may be even at that date. And it says "what is the
2 government saying, that there was prior drug transactions" --

3 THE COURT: Who is this speaking now?

4 MR. PICCININI: Ms. Diggs.

5 BY MR. PICCININI:

6 Q. "What is the government saying, that there were prior
7 drug transactions to the date of indictment, the indictment
8 should include that period of time as a conspiracy. On or

9 about doesn't mean back it up another year. Which is what it

10 sounded like is the government is inclined to want to do.

11 Within the context of that proffer, I still don't know, are you

12 talking about one occasion, ten occasions." And the court says

13 "he just told you, I gather, there are a half dozen occasions

14 or so." Mr. Trucilla says "I don't know, your Honor, I've read

15 the report of this particular witness, I could specifically

16 find out, I could maybe find out right now." And you then,

17 still concerned about what you're being told, "that's what

18 today is for. The order says give those things today. What

19 I'm saying, he keeps speculating on stuff, if we could just

20 have it, we wouldn't be doing this for an hour and a half." Ms.

21 Diggs, after having read through that with me, do you still

22 believe you were just at the pretrial hearing accepting Mr.

23 Trucilla's representations concerning the 404(b) or isn't it

24 true you were still challenging him about the 404(b)?

25 A. I heard his representations, I was still challenging the

1 need for the details. The representations he gave me in that

2 page and a half, even if you skipped over, he was outlining

3 history, it did not match up with the documents that were

4 subsequently provided. That was my problem.

5 Q. That's not what I'm saying, how can you talk now in the

6 October 23rd discussion claiming that your concern about the

7 404(b) is it didn't match up with the Jencks material; you

8 didn't have the Jencks material yet?

9 A. Exactly.

10 Q. Would you agree with me that on October 23, 1998, long

11 before you got the Jencks material, you were concerned that Mr.

12 Trucilla was either overstating or not accurately stating the

13 404(b), that's why you wanted the Jencks material?

14 A. Yes, I would agree with you.

15 Q. And in light of fact that this occurs on October 23,

16 1998, wouldn't you have called your boss, Mr. Hackney, or your

17 co-worker, Mr. Hackney, even after October 23, 1998, concerned

18 that the government is not providing you enough information?

19 You said earlier that your notes concerning the October 28th

20 conversation or sometime thereafter, had to be after trial, why

21 wouldn't it have been back on October 23, 1998?

22 A. Because at that point there was no mismatch between what

23 the government said it was prepared to prove and this
24 subsequent documents that they actually produced. There was no
25 mismatch, I didn't have documents yet. So I'm going with a

35

1 verbal representation.

2 Q. Let me go through some of the matters, you indicated to
3 this court that after having reviewed the Jencks material,

4 there was practically nothing consistent with what Mr. Trucilla
5 had indicated would be produced in 404(b), is that your
6 testimony?

7 A. Yes.

8 Q. I'm going to show you the 404(b), since it's already been
9 marked, your Honor, I'm going to actually talk about the
10 specific documents.

11 THE COURT: How is it marked by the way?

12 MR. PICCININI: It was marked by counsel --

13 MR. ANTKOWIAK: I think it was Petitioner's B, your
14 Honor.

15 BY MR. PICCININI:

16 Q. These are particular documents within Petitioner's B,

17 I'll clearly explain what those are. First of all, included

18 within the 404(b) materials was an April 10, 1998 interview

19 with a Roxanne Arnold. I'm going to ask you to review this

20 particular interview with Roxanne Arnold. I think if you make

21 it through the first two paragraphs that might save you?

22 A. Okay.

23 Q. If I can go over the second paragraph with you. This is

24 an FD-302 report, dated April 10, 1998, concerning an interview

25 with Roxanne Arnold. Ma'am, after having reviewed it, would

36

1 you agree with me that this Roxanne Arnold states in the 302,

2 and a 302 is just a recitation of what the interview was, it's

3 not a current interview, it's not your opportunity to actually

4 talk with her, this is the FBI's recitation of that, is that

5 your understanding?

6 A. Yes.

7 Q. Here it says "Egypt," who in this case was Mr. Barnette,

8 do you recall?

9 A. I do.

10 Q. "Egypt introduced a black male from Detroit as a cousin.

11 He is the one in the photograph with the marked name Mark

12 Chinn." You'd agree with me that in the course of this trial

13 Mark Chinn was your client, Mr. McCoy?

14 A. Yes.

15 Q. "Chinn had a nickname, but Arnold cannot recall it at

16 this time. This was during the summer of 1997, while Arnold

17 was at Lottie Freeman's apartment at 13th and German. Chinn

18 hung around with Manis Norman and Joshua Chavers, who were

19 staying with Freeman. Chinn was hanging around 13th and

20 Parade, selling drugs for Egypt. Chinn stayed in the apartment

21 building on Parade Street with a Hispanic female. Chinn's

22 grandmother died during the summer, and Chinn returned to

23 Detroit. Arnold has not seen Chinn since then."

24 Ma'am, would you agree with me that it was in your

25 client's interests that Roxanne Arnold not testify that Chin

1 was hanging around 13th and Parade and was selling drugs for

2 Egypt?

3 A. Yes.

4 Q. And it would be in your interest to keep this particular

5 404(b) evidence out?

6 A. Yes.

7 Q. And in your consideration of what a Jemal stipulation,

8 _____
counsel said you didn't know what a Jemal stipulation was, but

9 _____
you do today?

10 A. Yes.

11 Q. And you very accurately stated that the purpose of the

12 Jemal stipulation -- that the purpose of, one of the purposes

13 _____
of the Jemal stipulation is to keep out this type of bad

14 conduct evidence?

15 A. Yes.

16 Q. And you'd agree with me that this 302 provided that

17 information?

18 A. Yes.

19 Q. Would you also agree with me that on October 23rd, Mr

20 Trucilla said that in the summer of '97 into the winter, and he

21 talked about timeframes, there would be testimony that your

22 client was selling drugs for Mr. Barnette?

23 A. Is that what the 302 says?

24 Q. This 302 says "Chinn was hanging around 13th and Parade

25 selling drugs for Egypt."

38

1 A. In the summer of?

2 Q. It says this was during the summer of 1997?

3 A. Okay, yes.

4 Q. And then second, another interview of Roxanne Arnold,

5 this is another FBI 302, dated May 22, 1998. This is an

6 interview conducted by Special Agent Shawn VanSlyke. Here I'm

7 going to have you read, once again it's a short 302, if you

8 could read through that?

9 A. Okay.

10 Q. Would you agree with me that in this particular 302, Ms.

11 Arnold, in this summary of her interview on May 22, 1998,

12 states that "during a previous interview, Arnold had been shown

13 a photograph of Marcresse McCoy by detectives. At that time

14 Arnold had indicated that she recognized the individual as

15 being an associate of a black male known to Arnold as Egypt."

16 Once again, would you agree with me that Roxanne Arnold was

17 prepared to testify in the course of this 404(b), if it was

18 allowed in, that she recognized your client as being an

19 associate of Egypt, the defendant Barnette?

20 A. Yes.

21 Q. And further in the 302, would you agree with me that this

22 Jencks material indicated to you that Arnold recalled that the

23 individual whose photographs she recognized was known to her as

24 Two-four; are you familiar with the fact that one of the

25 nicknames for your client was Two-four?

39

1 A. Yes.

2 Q. And she went further, "that Two-four had stayed at the

3 apartments above the old auto parts store on Parade Street,

4 near the intersection of East 13th Street, during the summer of

5 1997. He stayed there with several Spanish-speaking people.

6 Arnold saw Two-four in Terry Siegworth's car one day with

7 another black male. Later on that same day, Arnold gave

8 Two-four and Egypt a ride together in her own car." Now, with

9 regard to the association of Mr. McCoy with Mr. Barnette, was

10 it in your interests to not provide, to not allow the jury to

11 hear of the link between the two of them?

12 A. That was not a concern.

13 Q. How about the association, Two-four's association with

14 Terry Seigworth, who was a confidential informant, the first

15 witness that testified in the case; was it in your client's

16 interest to link him with Seigworth and with Barnette

17 throughout the case?

18 A. I wasn't concerned about that. I was concerned about the

19 prior history of drug trafficking between Barnette and McCoy.

20 Q. And then finally a 302 dated October 20, 1998, another

21 interview with Roxanne Arnold. I would just refer you to

22 probably the third paragraph, that's what I'll question you

23 about?

24 A. Okay.

25 Q. You recall that part of what the government wanted to do

40

1 with the 404(b) is to show the similarities in the baggies that

2 were used in a previous drug dealing relationship and the

3 baggies that were found in this case, do you recall that?

4 A. Yes.

5 Q. Here Ms. Arnold would, in this 302, in the Jencks

6 material, "identified the various baggies containing crack
7 cocaine shown to her as being packaged in the same manner as
8 Barnette packaged his crack cocaine. Barnette was the first
9 individual who Arnold had ever known to package cocaine in
10 baggies that small. Arnold recalled giving Barnette a ride to
11 buy these small baggies in Erie. Barnette would sometimes buy
12 them at Maurice Tate's store." Was it in your interest to keep
13 out, even though Mr. McCoy is not mentioned, was to keep out
14 the similarity of the packaging between Mr. Barnette, excuse
15 me, the packaging between prior drug dealings and the dealings
16 in this case?

17 A. I didn't care about the signature situation, that
18 affected Barnette, it didn't affect McCoy.

19 Q. But how could it not have affected McCoy when the
20 evidence was going to come in, without a stipulation, that Mr.
21 Barnette and Mr. McCoy were linked together?

22 A. Because there was never any representation that McCoy was
23 linked to what the government was describing as the signature
24 of those particular baggies.

25 Q. But if he was in a prior drug dealing relationship with

1 your client and all of the evidence against Mr. Barnette is
2 allowed in, including his being formerly a drug dealer, his
3 being associated with your client, and all the evidence that
4 actually came in about them coming here together, was it in
5 your client's interest for even the 404(b) against Barnette to
6 come in because it would only have further brought Mr. McCoy
7 down with him?

8 A. I disagree with you.

9 Q. Okay. Now, you correctly stated to Mr. Antkowiak that
10 the purpose of entering into the Jemal stipulation, included
11 _____
12 not only the 404(b) evidence being kept out and other prior bad
13 acts, but also convictions. In this case didn't you
14 successfully keep the jury from hearing the nature of your
15 client's prior felony firearm conviction from their
16 consideration?

16 A. Yes, we did enter into a stipulation with regard to that.

17 Q. Well, there's a couple stipulations. First of all, there
18 was an Old_Chief stipulation, which allowed you to keep the
19 _____
20 jury from knowing of it, from the felony possession offense

20 itself. But even in light of the Old_Chief stipulation, the

21 government was providing, was attempting to provide that

22 conviction as it related to gun convictions, guns being tools

23 of the trade. His prior conviction being an indication as to

24 why he would have been concealing the particular firearms in

25 the bag itself, and the Jemal stipulation is actually what

42

1 helped to keep out that conviction; do you recall that?

2 A. I don't think the Jemal stipulation was connected to the

3 firearm. We entered into stipulations specific and unique to

4 the firearm.

5 Q. But separate from your Old_Chief stipulation, do you

6 recall the government attempting to get in your client's prior

7 firearm conviction and you having to rely on Jemal or the court

8 utilizing Jemal to keep that particular conviction out. It

9 wasn't because of Old_Chief, it was because intent and

10 knowledge were not at issue?

11 A. No, I don't have that recollection.

12 Q. Ma'am, as we go through -- counsel asked your decision to

13 stipulate with the consent of your client. If you go back in

14 this case, would you agree with me that your entire defense of

15 this case was that your client did not possess the bag?

16 A. Yes.

17 Q. And would you also agree with me that you were not the

18 person who decided for the defendant that that would be the

19 defense?

20 A. I did decide that.

21 Q. Well, isn't it more true, Ms. Diggs, that your client

22 decided it for you when he stepped off the bus carrying the bag

23 and himself claimed that the bag was not his. He claimed

24 adamantly not only that the bag was not his, but he didn't

25 possess the bag and he did not carry the bag off the bus; do

1 you recall that?

2 A. I recall that.

3 Q. And do you also recall that the testimony showed and your

4 client on the particular date, not only said that the bag

5 wasn't his, said that he never carried it off the bus, but

6 actually stepped away from the bag; do you recall that

7 testimony?

8 A. You're talking about the testimony of the officers?

9 Q. Yes, the testimony of the officers with regard to what

10 your client did on that day after he came off the bus?

11 A. That was the testimony of the police officers, yes.

12 Q. Well, isn't your client -- that this had to be the only

13 plausible defense because he himself was the one who said I

14 didn't possess the bag, even in light of the evidence, he stuck

15 you with this defense I did not possess the bag?

16 A. That's not correct.

17 Q. How could you possibly in this case reasonably have come

18 in, after your client adamantly denied the bag was his, that he

19 adamantly denied that he walked and carried the bag himself,

20 how could you possibly have come into trial and said well,

21 forget what my client said there on that day, he really did

22 possess the bag, even though he said he didn't, but he didn't

23 know what was in it; does that seem like a reasonable defense

24 to you?

25 A. It seems like part of a reasonable defense. The Jemal

1 stipulation kept me from presenting the entirety of a

2 reasonable defense.

3 Q. Ma'am, I want to talk a little bit about your

4 representation of this particular client. I'm going to show

5 you the docket entries on this case, just for identification

6 purposes because these are matters of record, I'll mark them as

7 Government Exhibit 1. This is just a printout of the criminal

8 docket in Mr. McCoy's case.

9 A. Okay.

10 Q. I'd like to go through with you, ma'am, your zealous

11 representation of your client throughout the course of this

12 case because I think it's important for the court and for us to

13 talk about it. First of all, with regard to this particular

14 case, you'd agree with me that you passionately represented Mr.

15 McCoy in this case?

16 A. Yes.

17 Q. You put significant effort into every step of your

18 representation of this man in this courtroom?

19 A. Yes.

20 Q. And that representation started at the very beginning of
21 the case through the process of filing the pretrial motions,
22 didn't it?

23 A. McCoy was my client from the time he was arrested all the
24 way through the trial. Everything that was done to defend the
25 case was done by me.

45

1 Q. And in this case, on behalf of your client, in a review
2 of whether you were effective or ineffective, you started off
3 with filing a motion for bill of particulars, not just a
4 boilerplate one, but one where you had specific reasons for
5 requesting the government to provide more information
6 concerning the case; do you recall having done so?

7 A. I don't have specific recall of each process along the
8 way. I also don't have any reason to quarrel with anything
9 this is docketed.

10 Q. All right. Well, you filed a motion for bill of
11 particulars, a motion in limine to exclude evidence of
12 defendant's prior convictions. A motion to produce evidence,

13 excuse me, a motion to analyze and weigh the evidence. In this

14 particular case, here it was a drug case and rather than just

15 accept the government's scientific analysis of the evidence,

16 you actually filed a motion to go so far as to have it

17 independently analyzed and weighed, didn't you?

18 A. Yes.

19 Q. Do you do that in every single solitary drug case where

20 you represent defendants?

21 A. Not in every single solitary one, no. Whenever the

22 weight is a close issue one way or the other, then yes.

23 Q. Then you filed and joined in a motion to suppress.

24 Rather than just filing a request for discovery, you filed a

25 specific motion commanding the government to comply with

46

1 discovery, did you not?

2 A. Yes.

3 Q. Is that essentially what you did?

4 A. Yes, I did that.

5 Q. You then adopted and incorporated Mr. Barnette's motions?

6 A. Yes.

7 Q. You then filed a separate motion to exclude for

8 disclosure of and exclusion of statements made by Mr. Barnette,

9 is that correct?

10 A. I don't think I filed anything with regard to Mr.

11 Barnette.

12 Q. Motion by Marcresse McCoy to disclose or exclude

13 statements of co-defendant with citations of authority, with

14 proposed order?

15 A. Okay.

16 Q. You did a good job there as well, you continued to file

17 all of these pretrial motions on behalf of your client, is that

18 correct?

19 A. Yes.

20 Q. In this case there are several indications in the docket

21 that you filed sealed motions. And likely those are sealed

22 motions to obtain subpoenas for particular evidence or Rule 17

23 for particular evidence in this case. Do you recall the

24 process that you went through to put together the defense that

25 you presented, specifically, the challenging of two veteran

1 police officers and an indication that at trial they lied.

2 What efforts did you put forth to put together that defense?

3 A. The entire defense of the case I would say were my best

4 efforts, as well as the best efforts of the office, the

5 investigator and the secretary in that office, and at times

6 people from the Pittsburgh office as well.

7 Q. And you went so far as to actually find a former Erie

8 police officer who would come in here and testify on the stand

9 that the two particular witnesses that you were challenging,

10 police officers, would in fact lie in the course of a drug

11 investigation, you found such a witness?

12 A. Yes.

13 Q. And you put forth such a witness?

14 A. Yes.

15 Q. And not only did you find that particular witness, Mr.

16 Antkowiak talked about -- well, you know your client was seen

17 by two witnesses come off the bus, two police officers, and a

18 third witness saw him with the bag. But you didn't just accept

19 that your client was out of luck on the possession charge, did

20 you?

21 A. No.

22 Q. Was that all that was there at the time that Mr. McCoy

23 got off the bus, were there just those two police officers and
24 Mr. Grier there to testify concerning the possession of the
25 bag?

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1 A. No.

2 Q. Wasn't it part of your case, didn't you discover that
3 there were as many as 15 police officers that were there; do
4 you recall that?

5 A. Yes.

6 Q. And didn't you go so far with regard to this client on
7 the possession defense, as to expose that one of the most
8 senior police officers there, Mr. Bozich, he did not even
9 observe your client come off the bus with the bag?

10 A. Yes.

11 Q. And Agent VanSlyke didn't observe him come off the bus,
12 he just merely said he was standing in proximity to the bag?

13 A. My recollection is the only two people that could
14 identify Mr. McCoy as coming off the bus with the bag were the
15 two Erie police officers.

16 Q. And consistent with your client's claims on that first

17 day he didn't possess the bag, you did everything you could to
18 drag those police officers and their credibility and I don't
19 mean this derogatorily, but through the mud for that purpose
20 and on behalf of your client?

21 A. Yes.

22 Q. During the course of the pretrial discussions, do you
23 recall very clearly stating to the court, even outside the
24 context of the Jemal stipulation, that your defense in this

25 case was my client didn't possess the bag?

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1 A. Prior to the Jemal stipulation, the defense on the case

2 would not have been limited to possession. That was the point
3 of the Jemal stipulation. Once we were limited to possession,

4 then yes, that is what I did. So the best efforts were put
5 forward to defend on the possession and we relinquished the
6 opportunity to defend on knowledge and intent.

7 Q. But you never made any request or any indication to the
8 court whatsoever that the wise defense in this case was to

9 challenge knowledge and intent. There's nothing in the record

10 that ever indicates, even in the pretrial hearings, any of the

11 hearings, even during the discussions of Jemal, that your

12 defense, a wise defense, was anything other than my client

13 didn't possess the bags?

14 A. Are you asking if I agree with you?

15 Q. Yes, do you agree with me?

16 A. No.

17 Q. At what point in time, do you recall any point in time

18 ever indicating to the court, to counsel or anything on the

19 record, that your defense, Jemal stipulation or not, was this

20 is not -- my client did not possess the bag?

21 A. I don't recall being asked by the court how I intended to

22 defend the case. To the extent that the defense issue came up,

23 it was with regard to the Jemal stipulation. I don't think the

24 court ever asked me what my intentions were.

25 Q. In your pretrial preparations with regard to tracking

1 down Sergeant Dollinger, getting all of the evidence concerning

2 your client's health care concerns, do you recall that you
3 ended up getting the government to stipulate to the significant
4 medical concerns that your own client had?

5 A. I recall that, yes.

6 Q. All of your pretrial efforts in this case related to a
7 defense of my client did not possess the bag?

8 A. I disagree that all the pretrial efforts to defend the
9 case were unique to possession.

10 Q. What else was there, what else did you do in that regard
11 because this was the best defense, what steps did you take with
12 regard to those other two issues?

13 THE COURT: The other two issues being knowledge and
14 intent?

15 BY MR. PICCININI:

16 Q. Knowledge and intent as to the PWID charges?

17 A. I don't even know how to answer that question.

18 Q. Well, Ms. Diggs, maybe the reason you can't answer is you
19 picked the right defense. Your client was stuck with the
20 defense of I didn't possess the bags. Your client, if you
21 didn't enter into the Jemal stipulation, would have been linked

22 into Mr. Barnette and the best defense here, was because your

23 client gave you it, was that he didn't possess the bag, he was
24 too frail to carry the bag. He didn't carry the bag, he was so
25 frail that he had the other guys carry off his own personal

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1 belongings, that was your best defense in this case. It's
2 great with hindsight to say no, but in this case you chose,
3 because your client was part of it, the defense of I did not
4 possess the bag?

5 A. You are linking together things that obviously from your
6 position link, they don't link for me. My client did not
7 choose that defense. My client was linked to Barnette anyway.
8 But the Jemal stipulation restricted the defense to possession.

9 And yes, I did the best that I thought that I could do within
10 that restriction. But there was no value in creating that
11 restriction for him or for his defense. That then gave the
12 opportunity to say to the jury, even if you think I possessed
13 this bag, there is no reason to believe that I knew what was in
14 it or I had the intent to distribute drugs. And those are
15 equally if not more powerful defenses than do you think I held

16 this bag. Especially when you have two, as you say, veteran

17 police officers testifying that he did hold the bag.

18 Q. Ms. Diggs, that is a convenient statement for today

19 but --

20 A. It's not convenient.

21 THE COURT: Hang on a second. Don't talk over each

22 other, he's having a hard time getting this down. And don't

23 editorialize.

24 BY MR. PICCININI:

25 Q. Ma'am, with regard to the defense in this case, even

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1 though the record may show these were two veteran police

2 officers, you're the one who went through all this effort to

3 expose two veteran police officers and find their former

4 supervisor, so you're saying that you didn't accept that as

5 being a strong case from the government because you had

6 evidence to show it was weak, didn't you; you had evidence to

7 show that the observations of these two police officers was

8 weak, you exposed it as being weak to this jury?

9 A. I challenged the credibility of the officers, yes, I did.

10 What I did not do was challenge knowledge and intent. That's a
11 decision that I made without my client's input and the decision
12 undermined and was counterproductive to the defense of the
13 case. It was an error in judgment on my part. And I am the
14 one that had the responsibility to defend him. And you can
15 stand here in court and say it's convenient today, but you
16 don't know.

17 THE COURT: All right, we're going to take a break
18 now.

19 (Recess from 11:15 a.m.; until 11:22 a.m.)

20 THE COURT: All right, let's go.

21 BY MR. PICCININI:

22 Q. Ms. Diggs, I want to apologize to you, I mean this
23 sincerely, it is not my intention to upset you. My questions
24 are of you for the purpose of defending your conduct as this
25 particular defendant's counsel. And these questions are meant

1 to expose the incredible job that you did in putting together
2 the defense. And they will probably continue to upset you,
3 that's not my intention, it's my intention to defend your

4 conduct and indicate to this court, if I can, that you were not

5 ineffective because the record does not support a claim of

6 ineffectiveness, particularly against you. Now, you've

7 indicated earlier on in your testimony on direct that you do

8 not recall specifically entering into the Jemal stipulation

9 until the jury instruction issue came up, is that your

10 recollection?

11 A. I believe my testimony was that I did not overtly enter

12 into it. As close as I came was what I would describe as a

13 tacit entering into it, based on my failure to object to the

14 jury charge. However, it was my understanding that everybody

15 proceeded in this case, I did, the U.S. Attorney did, and I

16 believe the court proceeded as though I entered into it, even

17 though I never signed off on the documents.

18 Q. Well, there's a couple questions that I want to ask you

19 with regard to that. First of all, I'm going to show you the

20 transcript of October 23, 1998, the hearing on pretrial

21 motions. This would be at page 43 of this particular

22 transcript. This is specifically a detailed discussion of

23 whether you would enter into the Jemal stipulation, okay?

24 A. Yes.

25 Q. I'm going to go through it with you. And this is the

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1 court on page 43 stating, "I want the record to be very clear

2 here, I'm not asking you to stipulate, I'm not saying you

3 should or you shouldn't, I'm simply doing what I think what

4 Jemal, what the Third Circuit suggests it is useful for the

5 court pretrial to explore the possibility of a Jemal type

6 stipulation. You're free not to stipulate if you don't want to

7 stipulate." And you respond, somewhat at this point in a

8 noncommittal fashion, you state "that's how I took the court's

9 inquiry, just the way you stated it, that's how I took it. To

10 the extent that the court is inclined to allow 404(b) evidence

11 in, I believe that McCoy's willingness to stipulate to

12 knowledge and intent, would preclude that 404(b) evidence.

13 Does that answer the question on Counts two and three, because

14 I don't want to be vague." The court responds, "well, here's

15 the problem. I haven't ruled on whether it's going to come in

16 or not. It seems to me you," Ms. Diggs, "have to make a

17 tactical decision in advance of my ruling in the best interests

18 of the client. At the end of the day, we still have this
19 conspiracy issue floating around out here. Now, this much I
20 will say, for instance, I see no basis for the firearm matter
21 absent if intent or knowledge is not in the case. Insofar as
22 the possession charge is concerned, I see no basis for it and I
23 can't see it coming in." And Mr. Trucilla then responds, this
24 moves from the bottom to 44, "I would agree if there was a
25 stipulation that knowledge and intent, in other words, he's a

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1 former convicted felon under the definition of what a felon is
2 or the firearm count, there's no other stated purpose other
3 than knowledge and intent. So a Jemal stipulation would take
4 that out, would only leave possession as the issue." The court
5 says, "right?" And you Ms. Diggs say "I agree." And then two
6 lines down the court says, "so we have identical stipulations
7 then from both defendants with respect to knowledge and intent,
8 is that right?" Ms. Diggs, "yes." Mr. Sambroak, "yes."
9 Okay. I want to ask you a couple questions about this, it
10 points out two of the things that we've discussed. First of

11 all, whether you currently recall having, not tacitly but
12 directly agreed to the stipulation. I understand what your
13 current recollection is, but going through those two pages, 43
14 and 44, wouldn't you agree, first of all, that whether it was
15 going to be your tactical decision or not, the court, as likely
16 is the proper procedure, in order to resolve the 404(b) issue,
17 allow the parties to enter into a stipulation, he specifically
18 told you that you have to make a tactical decision in advance
19 of my ruling, prior to my ruling on the 404(b), you must make a
20 tactical decision in the best interests of the client. Don't
21 you read that to say that, I can sit in your place while the
22 judge makes that comment to you, is he telling you prior to the
23 404(b), you make a tactical decision on whether to enter into a
24 Jemal stipulation?

25 A. Yes, I agree.

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1 Q. In response to that, you would agree that on page 44, "so
2 a Jemal stipulation would take that out, would only leave

3 possession as to the issue," Mr. Trucilla says. The court says

4 "right." You say "I agree." And the court specifically says

5 to you, so we have identical stipulations?

6 MR. ANTKOWIAK: Your Honor, can he read the whole

7 thing because counsel is skipping over a line.

8 MR. PICCININI: Okay.

9 THE COURT: Back up, go ahead.

10 BY MR. PICCININI:

11 Q. The court says "right." Ms. Diggs says, "I agree." And

12 the court says "you agree with what?" Ms. Diggs says "I agree

13 that that's accurate and I can present that to my client and

14 will do that." The court then says, and I apologize, it wasn't

15 my intention to keep that out, the court then says "so we have

16 identical stipulations then from both defendants with respect

17 to knowledge and intent, is that right?" And you then say

18 "yes." And Mr. Sambroak says "yes." Does that appear to be on

19 the record contrary to your current recollection that you

20 didn't tacitly but you did directly agree to the content of the

21 stipulation?

22 A. No.

23 Q. Why is that?

24 A. Because it sounds like you're talking about something

25 related to the firearm. I don't recall the firearm being part

1 of the Jemal stipulation. Plus it sounds like we were still

2 going back and forth as we did over and over about whether I

3 had to make a decision on Jemal before or after the court ruled

4 on the 404(b). And what I recall is I kept -- hemming and

5 hawing and dragging my feet, for lack of better words, because

6 I didn't know what the 404(b) was yet. And I kept saying if I

7 knew what it was, I will talk about it with my client, if it

8 makes sense for his case, we'll do it. And what you just read

9 to me sounds like another one of those exchanges.

10 Q. I would agree with that. But here there is no hemming

11 and hawing in the court's statement whether you needed to

12 decide before or after the 404(b). The court specifically says

13 it seems like you need to make a tactical decision?

14 A. That's what it says, yes.

15 Q. And then on a separate issue, we talked earlier about

16 whether your Old_Chief stipulation, I discussed this with you,

17 or the Jemal stipulation, is what successfully kept out the

18 former firearm conviction. And you're correct, this is a
19 discussion in the context of Jemal on page 44, that because of

20 your Jemal stipulation, you were able to keep out the firearm

21 conviction. Specifically, do you recall that even though you
22 were willing to stipulate to the nature of the firearm
23 conviction, that Mr. Trucilla was attempting to get that
24 firearm conviction in nonetheless as 404(b) as it related to
25 knowledge and intent because your client's former firearm

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1 conviction was relevant on knowledge and intent as to the guns
2 that were in the bag and his affiliation with firearms and
3 drugs because there was testimony about the guns being tools of
4 the trade. Wouldn't you agree with this, in the context of
5 your client's former prior conviction for being a felon in
6 possession, Mr. Trucilla indicates his intention to get that
7 into evidence, and he then states, "so a Jemal stipulation

8 would take that out, would only leave possession as to the
9 issue." The issue he's referring to is the firearm conviction.

10 So even though it may not comport with your current

11 recollection, does it appear, would you agree that it appears

12 from the record that your Jemal stipulation helped to keep out

13 completely from the jury's consideration the former convict not

14 to own a firearm conviction?

15 A. No.

16 Q. Why, it says right here, it says right here, "he's a

17 prior convicted felon with the definition of what a felon

18 is" --

19 THE COURT: You're going too fast.

20 BY MR. PICCININI:

21 Q. "There's no other stated purpose other than knowledge and

22 intent, the only knowledge and intent in this particular issue

23 related to the drug counts, so a Jemal stipulation would take

24 that out, would only leave possession as the issue." This is

25 not a discussion under Old_Chief, this isn't your earlier

1 attempt to stipulate away the content of the conviction, this

2 is specifically in relation to the government's intention to

3 use a former conviction in support of knowledge and intent of
4 the drug conviction themselves or the drug counts.

5 THE COURT: Mr. Piccinini, with respect to this
6 issue, at the end of the day I'm going to have to draw my own
7 conclusions as to what the transcript says. So why don't you
8 move on to another area.

9 BY MR. PICCININI:

10 Q. Would you also agree with me that in the context of the
11 Jemal stipulation, that all the parties agree that the Jemal

12 stipulation did not remove from the government its obligation
13 to prove each and every element of the conspiracy count. The
14 government still had to prove your defendant's knowing
15 participation in the conspiracy, Jemal or not; do you recall

16 that?

17 A. No.

18 Q. Okay.

19 A. It seems to me that Jemal would apply to the substantive,

20 as well as the conspiracy.

21 Q. But don't you recall the instructions that were given to
22 the jury because what happened with the jury is really what's

23 important, not your recollection, that the judge specifically
24 only gave a stipulation concerning Jemal as it related to the

25 two PWID, possession with intent to distribute counts, but not

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1 the conspiracy?

2 A. I don't recall that. If that is the case, it is. But

3 all that does is makes the Jemal stipulation even less

4 valuable. If it's only going to apply to the substantive count

5 and not going to apply to the conspiracy, then what's the

6 point.

7 Q. Well, how about your defense in this case, was that your

8 client didn't possess the bag?

9 A. Yes.

10 Q. Ma'am, with regard to your statement here today

11 concerning your current belief that you should not have entered

12 into the Jemal stipulation, you should have done a better job

13 for your client. At what point in time after the conviction in

14 this case did you first have discussions with your other

15 counsel in the Public Defender's Office concerning your

16 performance in this case?

17 A. I didn't -- I wasn't still a federal defender at the time

18 of sentencing. So I'm sure I had a conversation

19 post-conviction and presentencing. And then the initial phase

20 of the appeal was done within our office and I would have had a

21 conversation then.

22 Q. With regard to post-conviction, do you recall as I went

23 through the docket of the zealous representation of your

24 client, after his conviction in this case, is it always your

25 practice to file a post-conviction lengthy motion for judgment

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1 of acquittal with citations to authorities on behalf of your

2 defendants?

3 A. If I think it's appropriate, then, yes.

4 Q. In this particular case your representation, even though

5 you didn't represent him at sentencing, went well beyond the

6 jury deliberation. You recall that you had requested multiple

7 continuances to make sure you got the transcript, then you

8 actually filed a lengthy and detailed motion for judgment of

9 acquittal, do you recall that?

10 A. Yes.

11 Q. In this particular motion for judgment of acquittal, your
12 defense at trial was my client didn't possess the bag. Do you
13 recall that your defense in the motion for judgment of
14 acquittal particularly focused on that particular issue, that
15 my client did not possess the bag. You said, judge, how can a
16 jury have disagreed with this defense. Two police officers,
17 are the only ones who see him with the bag, they are liars.
18 That my client was physically incapable of carrying the bag.
19 The government stipulated to that stuff. In addition, my
20 client had a particular reason, not because of the conspiracy,
21 but to come here to meet up with this girl. That, judge, how
22 in the world could a jury reasonably have convicted my client
23 based upon that defense. I mean at no point did you bring up
24 your faulty decision to enter into a Jemal stipulation, you
25 never brought that up at that point in time?

1 A. If it wasn't brought up during the course of the trial,
2 how could I bring it up in the post-trial motions.

3 Q. Well, you bring it up here today?

4 A. I'm not bringing it up here. I'm a witness, because it's
5 been brought up here today.

6 Q. Okay, fair enough. After the other attorneys got
7 involved in this case, have they not approached you and shown
8 you exactly why it is that in their opinion today you were
9 ineffective back then?

10 A. No.

11 Q. When the Public Defender's Office attempted to allege one
12 of their own counsel's ineffectiveness, they didn't approach
13 you and let you know that they really thought you were
14 ineffective in this case?

15 A. No.

16 Q. They didn't tell you anything about that?

17 A. No. There's not that kind of conversation that goes on.
18 I think we try to leave the ability for the appellate attorney
19 to have an objective perspective. As opposed to taking on the
20 perspective of the trial attorney. Unless you're going to do
21 your own appeal work, which I did not in this case. And then
22 once ineffectiveness was alleged and it went outside of the
23 office, pretty much my interaction was when Mr. Antkowiak asked

24 me to review the file, I did. And he talked to me about what

25 my process was. But nobody ever sat down and said look at

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1 this, Khadija, this is where you messed up or this is why I

2 think you were ineffective. In fact, I don't think any of them

3 have ever said that. I think that's the conclusion that I can

4 see when I look at it.

5 MR. PICCININI: That's all I have, judge.

6 THE COURT: All right. Anything further, Mr.

7 Antkowiak?

8 MR. ANTKOWIAK: I do, just briefly, judge.

9 THE COURT: All right.

10 REDIRECT EXAMINATION

11 BY MR. ANTKOWIAK:

12 Q. Ma'am, counsel asked you some questions about Roxanne

13 Arnold. First of all, she wasn't the only witness who you got

14 Jencks material for, correct?

15 A. No, both me and Mr. Sambroak received Jencks for all of

16 the potential witnesses, whether they were directed at our

17 client or not, we all had everything.

18 Q. I previously in pleadings summarized that Jencks

19 material. You've also looked at it. Four of the witnesses,

20 Siegworth, Blackwell, Quinn and Smith, said absolutely nothing

21 about McCoy, is that correct?

22 A. Yes.

23 Q. And Peterson thought maybe she could identify a picture

24 of seeing him with Barnette at sometime in the distant past,

25 that was all she said, right?

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1 A. Yes.

2 Q. Now, Roxanne Arnold never actually did testify at trial

3 in this case, right?

4 A. She did not. There was some saga with regard to her, I

5 don't remember what it was. But she did not testify.

6 Q. Now, as the court ruled on the 404(b) evidence, isn't it

7 true the court allowed the government to offer testimony

8 showing the association of these two men in the past?

9 A. Yes.

10 Q. But Roxanne Arnold was never called to give any of that

11 testimony, was she?

12 A. No.

13 Q. And Roxanne Arnold, the court will see this, gave a bunch

14 of statements, only one of which has any allegation at all

15 about McCoy and drugs, correct?

16 A. Yes.

17 Q. And counsel read to you the part that says, this is the

18 one sentence that deals with the drugs, "Chinn was hanging

19 around 13th and Parade selling drugs for Egypt." Did it say

20 how she knew that?

21 A. No.

22 Q. When you read that information in the Jencks material,

23 did it cause you to believe, oh my God, thank God I gave this

24 Jemal stipulation because I can keep Roxanne Arnold's

25 speculation out?

1 A. No.

2 Q. Were you afraid of Roxanne Arnold to testify?

3 A. No.

4 Q. And when she didn't testify, the stipulation still was

5 entered and the jury charge was still given, wasn't it?

6 A. Yes. I think I would have had at least as good an

7 opportunity to impeach Roxanne Arnold as I had to impeach two

8 veteran police officers.

9 Q. Roxanne was a convicted federal drug felon, wasn't she?

10 A. I knew that there was some saga regarding her at the

11 time, I don't recall the specifics of what it was. That could

12 very well have been it.

13 Q. I think it's all in the Jencks material. Just one last

14 thing. Counsel asked you about whether you were ever called

15 upon to comment on the record about what your defense was or

16 things of that nature in this case; and, obviously, you didn't,

17 correct?

18 A. I did not.

19 Q. Do you remember a time when the government, through Mr.

20 Trucilla, commented on the question of whether or not Mr. McCoy

21 had actually possessed the blue duffel bag and whether or not

22 that was significant?

23 A. Say that again.

24 Q. I'll rephrase it this way. Do you remember as part of

25 your pretrial preparation and trying to gather evidence to

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1 impeach various government witnesses, you subpoenaed the Erie

2 Police Department for background records of the officers Kress

3 and Liebel?

4 A. Yes.

5 Q. And they moved to quash that subpoena?

6 A. Yes.

7 Q. And the court held a hearing as to their motion to quash?

8 A. Yes.

9 Q. At that hearing the court asked you what do you need this

10 for, and you basically said, well, I'm trying to impeach these

11 two individuals because they said they saw my client with a

12 bag?

13 A. Yes.

14 Q. Do you recall what Mr. Trucilla said about that?

15 A. No.

16 Q. Page six of the hearing of October 15th. Mr. Trucilla,

17 "first of all, what it boils down to is these two officers

18 testified that they saw the defendant with the blue canvas bag.

19 In and of itself that's not necessarily an incriminating factor
20 in this particular case, it's not the vital issue," he said.
21 "The vital issue is whether or not McCoy had knowledge of the
22 contents of that bag in conjunction with his possession of it.
23 So, in and of itself the fact that they can testify to the fact
24 he was carrying the bag, is not the ultimate issue." Did he get
25 it right?

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1 THE COURT: Is there a question there?

2 BY MR. ANTKOWIAK:

3 Q. Did he get it right?

4 A. Yes.

5 MR. ANTKOWIAK: That's all.

6 THE COURT: Anything else?

7 MR. PICCININI: One other issue, your Honor. Your
8 Honor, what I'd like to do is just note for the record that the
9 affidavit of Robert Sambroak that was provided as an exhibit in
10 our initial objection to the petition itself.

11 THE COURT: All right, very good. Ms. Diggs, you're
12 excused, watch your step on the way down.

13 MR. ANTKOWIAK: We have no other witnesses or
14 testimony at this time, your Honor, thank you.

15 MR. PICCININI: We have nothing in response, your
16 Honor.

17 THE COURT: So we're done?

18 MR. PICCININI: We're done.

19 THE COURT: I think it would be helpful to me to
20 have post-hearing briefs. But in fairness to both parties, I
21 think you're going to want the transcript, would you not?

22 MR. ANTKOWIAK: Yes, your Honor, I would, please.

23 THE COURT: So I will be looking for the
24 petitioner's brief within 30 days of the receipt of the
25 transcript. The government will have 30 days in which to

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1 respond.

2 When I said post-hearing briefs, what I'm really
3 anticipating is something akin to findings of fact and
4 conclusions of law. All right, thank you, counsel.

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6 (Whereupon, at 11:46 a.m., the proceedings were

7 concluded.)

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1 CERTIFICATE

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5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter.

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12 Ronald J. Bench

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